No. 95-244

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, HOLLAND-AMERICA INSURANCE COMPANY TRUST AND MISSION REINSURANCE CORPORATION TRUST,
Petitioner,

v.

ALLSTATE INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address the following question:

Whether the abstention powers of federal courts are limited to actions in equity, or alternatively, whether the exercise of *Burford* abstention is limited solely to actions in equity.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling in-

terest in legal issues that affect state and local governments. This case involves an issue at the core of *amici*'s interest: whether the discretion of a federal court to abstain in a case challenging state regulatory authority is limited to suits in equity.

Congress has granted the States broad authority to regulate the business of insurance. *See United States Dept. of Treas. v. Fabe*, 113 S.Ct. 2202, 2207 (1993). Pursuant to this authority, the States have enacted comprehensive and complex regulatory schemes including procedural and substantive provisions governing the liquidation of insolvent insurers. A liquidation "can involve billions in assets, hundreds of products, and thousands of policyholders spread over the world," Kathleen Heald Ettlinger *et al.*, *State Insurance Regulation* 221 (1995), as well as hundreds of reinsurance agreements with entities located throughout the world. State liquidation schemes generally designate the state insurance commissioner as liquidator and require all creditors (whether policyholders, reinsurers, or general creditors) to file any claims in the state receivership court and authorize the court to enjoin the prosecution of all other actions. The exercise of federal court jurisdiction thus has great potential to disrupt the orderly conduct of state liquidation proceedings and delay the final distribution of the estate.

Because of the importance of the issues raised in this case for both abstention doctrine generally and the conduct of insurer liquidation proceedings, *amici* submit this brief to assist the Court in its resolution of the case.[1]

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

This case arises out of the California Insurance Commissioner's nearly decade-long effort to liquidate the Mission Group of insurance companies. The Mission Group insolvency is one of the largest in U.S. history, involving hundreds of thousands of policy holders in all 50 States and hundreds of reinsurance agreements made with entities located throughout the United States and in more than two dozen foreign countries. Pet. 2. More than 180,000 claims have been filed in the liquidation proceedings by policyholders, third party claimants, reinsurers, and state guaranty associations seeking billions of dollars. *Id.* at 7.

Pursuant to the statutory duty to collect the debts due the various Mission companies' estates, *see* Cal. Ins. Code § 1037, the Commissioner brought this action in California Superior Court (the duly appointed receivership court) against respondent Allstate Insurance Company to recover sums owed under various reinsurance agreements to the Mission Insurance Company, one of the entities in liquidation. Pet. App. 14a-15a. Allstate invoked diversity jurisdiction, *see* 28 U.S.C. § 1332, to remove the action to federal district court. Pet. App. 15a.

Once in federal district court, Allstate moved under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, to compel the specific performance of arbitration clauses contained in the various reinsurance agreements. Pet. App. 15a. The district court put the motion off calendar and instead heard and granted the Commissioner's motion to abstain under the principles of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Pet. App. 23a-24a. Allstate appealed. *Id.* at 4a.

The court of appeals reversed. Notwithstanding that Allstate had sought as relief the specific performance of the arbitration clauses contained in the various reinsurance agreements, the court characterized the case as one "in which no equitable relief is sought." Pet. App. 2a. While the court of appeals acknowledged that this Court has "explicitly expanded some forms of abstention to a few 'special' classes of damages actions," it reasoned that the authority of federal courts to abstain "is founded upon a discretion they possess only in equitable cases." *Id.* at 11a. It further reasoned that this Court's decision in *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) (*NOPSI*), "gave strong indication that the power to abstain under *Burford* should not apply in suits at law." Pet. App. 12a. The court of appeals thus reversed the district court's abstention order and remanded the case for further proceedings. *Id.*

SUMMARY OF ARGUMENT

1. *Burford* abstention is not limited to actions which seek solely legal relief. The Court has long held that in deciding whether to exercise their statutorily granted jurisdiction, the federal courts must give "proper regard for the rightful independence of state governments in carrying out their domestic policy." *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935). Thus, while most of the Court's decisions upholding abstention have been premised on the traditional discretion exercised by courts of equity in deciding whether to grant relief, the Court has recognized that a federal court's authority to abstain is not rooted merely in the "technical rule[s] of equity procedure [but] reflect[s] a deeper policy derived from our federalism." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959).

The Court has thus instructed that in deciding whether to abstain, lower federal courts must consider such factors as the complexity of state law issues, the potential for disruption of the State's system of policy and review, and whether the State has provided an adequate forum. *See Burford*, 319 U.S. at 331-34. The Court has further recognized that even an action at law can be so disruptive of state autonomy as to warrant abstention. *See Thibodaux*, 360 U.S. at 28-30; *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 113-17 (1981).

Contrary to the reasoning of the court of appeals, this Court's decision in *NOPSI* does not foreclose abstention in an action at law. *NOPSI* did not involve an action at law and simply did not consider the question. Moreover, the *NOPSI* Court's discussion of the state regulatory body's assertions that abstention was appropriate under either *Burford* or *Younger v. Harris*, 401 U.S. 37 (1971), reaffirms that there is no *per se* rule prohibiting abstention in actions at law. As the *NOPSI* Court noted, *Younger* abstention "was based partly on traditional principles of equity but rested primarily on the 'even more vital consideration' of comity." 491 U.S. at 364 (quoting 401 U.S. at 43-44). And in discussing the state agency's *Burford* claim, the Court reiterated that abstention is appropriate "when there are 'difficult questions of state law bearing on policy problems of substantial public import' " or when " 'federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " 491 U.S. at 361 (citation omitted).

2. Weighing the relevant state and federal interests at issue here demonstrates why the district

court's abstention order should be reinstated. Allstate's asserted right to compel arbitration of its dispute can be raised in the state court proceedings. Allstate has made no showing that the California courts are inadequate for the protection of its right.

In contrast, California has a substantial interest in conducting the Mission liquidations in state court free from federal interference. California has exercised its authority under the McCarran-Ferguson Act to enact a comprehensive scheme regulating the "business of insurance" and has adopted complex provisions governing the liquidation of insolvent insurers and the rights and liabilities of various classes of creditors. *See* Cal. Ins. Code §§ 1010—1064.12. The State has also appointed a receivership court which has exercised its authority to enjoin interference with the various liquidation proceedings.

The court of appeals, however, gave no consideration to the State's substantial interest in having issues arising in the liquidation proceedings be resolved by the receivership court. Nor did it consider whether the state liquidation proceedings provided Allstate with an adequate forum. And most significantly, the court of appeals did not consider the complexity of the state law issues and the frustration of the State's policy which could potentially result from federal court intervention.

The Court, however, has long recognized a policy of federal court non-intervention in state insurer liquidation proceedings. *See Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 197-99 (1935). And it has not required the presence of an unclear issue of state law in ordering abstention in such cases. *See id.* But if the "proper regard for the right-

ful independence of state governments in carrying out their domestic policy," *Williams*, 294 U.S. at 185, requires abstention in such cases even when there are no unclear issues of state law, it must surely do so here where issues of great importance to the State's policy remain unsettled.

ARGUMENT

I. THE FEDERAL COURTS' AUTHORITY TO ABSTAIN IS NOT LIMITED TO ACTIONS WHICH SEEK EQUITABLE RELIEF

This Court has long recognized that the statutes conferring jurisdiction on the federal courts must be read against the common law background of exercising a principled discretion in deciding whether to hear a particular case. *See NOPSI*, 491 U.S. at 359 (citing David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 570-77 (1985)); *Thibodaux*, 360 U.S. at 30; *Burford*, 319 U.S. at 317-18. Thus, while the Court has characterized the obligation of federal courts to hear a case within their jurisdiction as " 'virtually unflagging,' " and said that abstention is " 'the exception, not the rule,' " *NOPSI*, 491 U.S. at 359 (citations omitted), it has recognized that there are some cases in which the interests of federalism and comity require the federal courts to decline to exercise their jurisdiction. *See* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. at 551.

The court of appeals, however, gave no consideration to California's substantial interest in conducting the Mission liquidations in a unified proceeding in its own courts. Instead, the court relied solely on the formalistic notion that abstention is appropriate

only when a federal court is called upon to exercise its equitable powers. But as explained below, the purpose of the *Burford* doctrine—the prevention of undue interference with state policy—would be ill served by a rule limiting its application to suits in equity, for under some circumstances an action for damages can disrupt state policy to the same degree as a suit for an injunction. The Court has long recognized as much and thus, contrary to the view of the court of appeals, has not imposed such a rigid limitation on the federal courts' authority to abstain. Rather, even in actions at law the Court has engaged in a careful examination of the relevant state and federal interests and ordered abstention when damages actions would unduly disrupt a State's well organized system of regulation and review. *See Fair Assessment*, 454 U.S. at 113-16.

This is such a case. As explained below, the regulation of insurance insolvency is a matter of exclusive state interest. *See* 11 U.S.C. § 109(b)(2) & (d) (excluding insurance companies from the coverage of the federal bankruptcy code); Ettlinger, *State Insurance Regulation* at 210. The statutory schemes governing the liquidation of a failed insurer involve complex procedural and substantive provisions, *see* Ettlinger, *State Insurance Regulation* at 220-21; Cal. Ins. Code §§ 1010–1064.12, and can, as here, involve difficult and unsettled issues of state law which should be decided in the first instance by the state courts. The federal courts should therefore abstain under the principles articulated in *Burford* and *Thibodaux*.

A. *Burford* Abstention Is Not Limited To Actions Which Seek Solely Equitable Relief

Our constitutional system is founded on the recognition that the States possess sovereign authority over "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people." The Federalist No. 45, at 296 (James Madison) (Isaac Kramnick ed. 1987). Even today, in an era in which "interstate commerce has become ubiquitous" and "activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power," *New York v. United States*, 112 S. Ct. 2408, 2419 (1992), the States continue to exercise substantial regulatory authority over numerous activities.

The Court has thus long recognized that in deciding whether to exercise their statutorily granted jurisdiction, the federal courts must give "proper regard for the rightful independence of state governments in carrying out their domestic policy." *Pennsylvania v. Williams*, 294 U.S. at 185; *Burford*, 319 U.S. at 318. To be sure, many of the Court's cases upholding abstention have been premised on the historic discretion exercised by courts of equity in deciding whether to grant or deny relief. *See, e.g., Burford*, 319 U.S. at 332-34. The Court, however, has made clear that a federal court's authority to abstain is not rooted in the "technical rule[s] of equity procedure [but] reflect[s] a deeper policy derived from our federalism." *Thibodaux*, 360 U.S. at 28; *see also NOPSI*, 491 U.S. at 364; *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 349-50 (1951).

These federalism interests are especially significant where, as here, a federal court is called upon to interpret the provisions of a complex state regulatory scheme. *See, e.g., Burford*, 319 U.S. at 327-28; *cf. Thibodaux*, 360 U.S. at 30. As the Court has observed, in such situations "the federal courts can make [but] small contribution to [a State's] well organized system of regulation and review . . . . [d]elay, misunderstanding of local law, and needless federal conflict with the State policy, are the inevitable product of this double system of review." *Burford*, 319 U.S. at 327. As the Court further observed in *Thibodaux*, a federal court should "ascertain the meaning of a disputed state statute from the only tribunal empowered to speak definitively—the courts of the State . . . rather than . . . make a dubious and tentative forecast." 360 U.S. at 29.

The Court's admonitions are founded on the recognition that, under our constitutional system, a federal court does not speak as the ultimate interpreter of a State's statutory scheme. *See Thibodaux*, 360 U.S. at 29-30.[2] An erroneous determination by the federal courts on an important issue of statutory

[2] *See also Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42-44 (1970) (per curiam) (instructing lower federal courts to abstain in damages action brought under diversity jurisdiction until the Puerto Rico Supreme Court interpreted unclear provision of commonwealth's law); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135 (1962) (per curiam) (vacating judgment of court of appeals in damages action brought under diversity jurisdiction on ground that controlling state law issue should be decided by the state courts); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960) (vacating judgment of court of appeals in damages action brought under diversity jurisdiction on ground that state courts might interpret state law to avoid constitutional question).

construction can have a profound effect on a State's policy and result in the reordering of the balance struck in the State's legislative and regulatory processes. Moreover, under our federal system such a determination cannot be appealed to the State's supreme court.[3] While such a decision presumably would be the law of the case as between the parties involved, state courts are not required to give precedential effect to an erroneous federal court interpretation of state law. *See Thibodaux*, 360 U.S. at 30. And while a subsequent state court decision might eventually make clear to federal courts the proper meaning of a state statute, the frustration of the State's policy caused by the erroneous construction will already have been done.[4]

[3] *Amici* acknowledge that the Court has, in some instances, directed the lower federal courts to certify questions of state law to the state supreme court. *See, e.g., Clay*, 363 U.S. at 212. Certification, however, is discretionary and utilized rarely. *See* John D. Butzner, Jr. & Mary Nash Kelly, *Certification: Assuring the Primacy of State Law in the Fourth Circuit*, 42 Wash. & Lee L. Rev. 449, 455 (1985) (estimating that out of 23,000 cases filed in Fourth Circuit, the procedure was used less than six times). *See also* Paul M. Bator *et al.*, *Hart and Wechsler's The Federal Courts And The Federal System* 1382 (3d ed. 1988) (noting "the danger that the certified question will be badly drafted, too abstract, or misunderstood by the state court, or that the federal court will be unsure of the significance of the answer"). While certification may be adequate in some circumstances, it is inappropriate in cases challenging complex regulatory schemes.

[4] *Burford* demonstrates that these concerns are not merely theoretical. As the Court explained:

> The most striking example of misunderstanding has come where the federal court has flatly disagreed with the position later taken by a State court as to State law. In those cases, the federal court attributed a given meaning to the state statute which went to the heart of the

B. Limiting *Burford* Abstention To Actions Which Seek Solely Equitable Relief Ill Serves The Doctrine's Vital Purposes

The Court's cases thus make clear that the principles of federalism and comity require that the lower federal courts, in deciding whether to abstain, consider such factors as the complexity of the state law issues, the potential for disruption of the State's system of policy and review, and whether the State has provided an adequate forum. *See, e.g., Burford*, 319 U.S. at 333-34; *Alabama Pub. Serv. Comm'n*, 341 U.S. at 349-50. The vital federalism concerns that underlie *Burford* abstention can be equally as pressing solely legal relief." *Id.* at 8a. In the court of aptions that seek a mixture of legal and equitable relief.

The court of appeals, however, gave no consideration to the purposes underlying *Burford* abstention or whether the state forum was inadequate. *See* Pet. App. 8a-12a. Instead the court categorically held that "*Burford* abstention does not apply to suits seeking solely legal relief." *Id.* at 8a. In the court of appeals' view, the abstention orders in *Burford* and *Alabama Pub. Serv. Comm'n* were premised solely on the historic discretion of courts of equity to refuse

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control program. The [Texas] Court of Civil Appeals disagreed, but before ultimate review could be had either in Texas or here, the legislature amended its statutes so that the cases became moot. Had the Texas Civil Appeals decision come first, it would have been unnecessary to make the changes which were made in an effort to stay within the limit thought by the Governor of Texas to have been set by the tone of the federal court's opinion. The Texas legislature later changed the law back to its original state, as clear an example of wasted motion as can be imagined.

319 U.S. at 327-28 (citations and footnotes omitted).

to grant relief. *Id.* at 9a-10a. And according to the court, "*NOPSI* suggests a renewed recognition that the power of federal courts to abstain from exercising their jurisdiction, at least in *Burford* abstention cases, is founded upon a discretion they possess only in equitable cases." *Id.* at 11a.

To be sure, many of the Court's abstention cases have rested on the traditional discretion which courts of equity exercise in deciding whether to grant or deny relief. But as the Court has made clear in numerous cases, abstention doctrine is not limited to suits seeking equitable relief but applies as well to actions at law which would unduly intrude on state sovereignty. *See Thibodaux*, 360 U.S. at 28-30; *see also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). As the Court explained in *Thibodaux*, "[t]hese prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect a deeper policy derived from our federalism." 360 U.S. at 28. And a leading authority observes:

> Many of these abstention cases involved claims for equitable relief, and in some instances the Supreme Court has invoked traditional equity principles to justify the decision not to proceed. But the cases have not been confined to actions in equity, and it is hard to see why they should be. The form of relief sought may have some bearing on the reasons for not proceeding, but it is certainly not the sine qua non of a decision to abstain. . . . To confine this form of discretion to equitable actions makes little sense, especially in a merged system.

Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. at 551-52; *see also Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141, 147 (8th Cir. 1995).

Thus, in *Thibodaux* the Court upheld a district court's order staying federal jurisdiction over an eminent domain proceeding, notwithstanding that the action was at law, because of an unclear issue of state law and "[t]he special and peculiar nature" of the proceeding. *Id.* at 28. As the Court further observed, "[t]he considerations that prevailed in conventional equity suits for avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities are similarly appropriate in a state eminent domain proceeding brought in, or removed to, a federal court." *Id.*

And in *Fair Assesment* the Court upheld the dismissal of a taxpayers' suit for damages brought in federal court under section 1983. In so holding the Court noted "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." 454 U.S. at 102. The Court further recognized that even though the taxpayers were seeking only monetary relief, the federal court's award of that relief would be tantamount to a declaratory judgment and "would be fully as intrusive as the equitable actions that are barred by principles of comity." *See* 454 U.S. at 113. Notwithstanding that the taxpayers' claims were premised on asserted violations of their federal rights, the Court consigned them to the state forum. *Id.* at 116. *Cf. Langnes v. Green*, 282 U.S. 531, 540-44 (1931) (ordering federal admiralty court to abstain to allow plaintiff to proceed with suit in state court).[5]

[5] The court of appeals' view that abstention "is founded upon a discretion [federal courts] possess only in equitable cases," Pet. App. 11a, is also irreconcilable with the doctrine

Thus, contrary to the view of the court of appeals, this Court has never held that a federal court's authority to abstain is limited to cases seeking equitable relief. Instead the Court has taken a pragmatic approach recognizing that damages actions can be just as disruptive of state sovereignty as suits in equity and that "'[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases.'" *NOPSI*, 491 U.S. at 359 (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987)). The Court has accordingly engaged in a careful examination of the relevant state and federal interests when called upon to review whether the

of *forum non conveniens*, under which actions at law have been routinely dismissed on the ground that the exercise of federal court jurisdiction would be inappropriate. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257-61 (1981) (upholding federal district court's dismissal of damages action brought under diversity jurisdiction on ground that the suit should be tried in foreign forum); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 512 (1947) (upholding federal district court's authority to dismiss damages action brought under diversity jurisdiction on ground that suit should be heard in another State); *Canada Malting Co. v. Paterson Steamships*, 285 U.S. 413, 417, 423-24 (1932) (affirming federal admiralty court's discretion to dismiss damages action within its jurisdiction on grounds that case should be heard in foreign forum). *See generally* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. at 555-57.

If the doctrine of *forum non conveniens* permits a federal court to dismiss a damages action, it is difficult to understand why its close relation of abstention, should be limited to suits in equity, particularly given the role the States play in our constitutional system. *See Gulf Oil*, 330 U.S. at 505 ("On substantially *forum non conveniens* grounds we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state.").

lower federal courts should abstain in a particular case. *See* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. at 582-83.

Nor is there any merit to the court of appeals' view that *NOPSI* changed this. *NOPSI* did not involve a claim for damages but rather claims for the equitable remedies of injunctive and declaratory relief. *See* 491 U.S. at 353. It is thus implausible to suggest, as the Ninth Circuit did, that the Court was overruling the pragmatic approach of cases such as *Fair Assessment* and *Thibodaux*, which make clear that the nature of the relief sought is not the *sine qua non* of abstention. *NOPSI* simply did not consider the question.

Moreover, *NOPSI*'s discussion of the state regulatory body's assertion that abstention was appropriate under either *Burford* or *Younger v. Harris*, 401 U.S. 37 (1971), indicates that the Court was not overruling such cases as *Fair Assessment* and *Thibodaux* to hold that abstention is always inappropriate in cases seeking legal relief. *See generally* 491 U.S. at 360-73. To the contrary, the Court's discussion of the *Younger* doctrine noted that the holding "was based partly on traditional principles of equity but rested primarily on the 'even more vital consideration' of comity." 491 U.S. at 364 (quoting *Younger*, 401 U.S. at 44) (internal citation omitted). The Court further explained:

> this includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

Id. (quoting *Younger*, 401 U.S. at 44).

Similarly, the *NOPSI* Court's rejection of the state agency's *Burford* claim reiterated that *Burford* abstention is appropriate "when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or . . . where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" 491 U.S. at 361 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). In *NOPSI* there was simply no "state-law claim" at issue, "nor even an assertion that the federal claims are 'in any way entangled in a skein of state-law that must be untangled before the federal case [could] proceed.'" *Id.* at 361 (quoting *McNeese v. Board of Education*, 373 U.S. 668, 674 (1963)).[6]

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[6] The Commissioner has framed the second question in the petition based on the court of appeals' characterization of this case as one "in which no equitable relief is sought." *See* Pet. App. 2a. But the relief Allstate seeks in federal court—an order compelling arbitration—is not properly characterized as legal in nature. As several courts of appeals have noted, a motion to compel arbitration "is a request that the court compel specific performance of an agreement to arbitrate." *Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co.*, 801 F.2d 748, 750 (5th Cir. 1986); *see also Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468, 472 (2d Cir. 1980). As such, Allstate's claim is equitable in nature, *see Guinness-Harp*, 613 F.2d at 473, and is governed by the rules applied by courts of equity in suits for specific performance. *See In re Utility Oil Corp.*, 10

As the foregoing demonstrates, a federal court's authority to abstain is not limited to those cases which seek solely equitable relief. Indeed, given our

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F. Supp. 678, 680 (S.D.N.Y. 1934); *cf.* 81 C.J.S. *Specific Performance* § 6, at 705 (1977) ("The granting of specific performance is governed by the elements, conditions, and incidents which control the administration of all equitable remedies, and specific performance will be ordered only on equitable grounds in view of all the conditions surrounding the particular case.") (footnote omitted). *See also* 71 Am. Jur. 2d *Specific Performance* § 4, at 13 (1973).

One of the fundamental principles of federal equity jurisprudence is that a federal court must exercise its equitable jurisdiction with due regard for the rightful independence of state governments. *See Burford*, 319 U.S. at 317-18; *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 197 (1935). As the Court stated in *Burford*:

> Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion . . . "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest," for it "is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy."

319 U.S. at 317-18 (footnote and citations omitted); *see also Hawks v. Hamill*, 288 U.S. 52, 60-61 (1933). *Cf. National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S.Ct. 2351, 2354-57 (1995) (discussing policy of federal non-interference with state tax administration); *Younger v. Harris*, 401 U.S. 37, 43-45 (1971) (discussing policy of federal non-interference with state court proceedings).

While in deciding whether to abstain a federal court must also consider whether the State has provided an adequate forum, *see, e.g., Burford*, 319 U.S. at 334, where, as here, there has been no credible showing that the state liquidation proceeding is inadequate for the protection of Allstate's rights, the federal courts should abstain in favor of it. *See Penn Gen. Casualty*, 294 U.S. at 197.

merged system of law and equity such a rule is incompatible with the purposes of the *Burford* doctrine. It is likewise incompatible with the Court's recognition that even an action for damages can unduly disrupt state autonomy so as to warrant abstention. Of course, suits seeking equitable relief are more frequently strong candidates for abstention than those which seek only damages. Nonetheless, the Court has long made clear that the nature of the relief sought is only one of several factors that a federal court must consider in determining whether to abstain.

II. *BURFORD* ABSTENTION IS PROPER IN THIS CASE

The court of appeals thus erred in failing to take into consideration the relevant state and federal interests at issue here. An examination of these interests demonstrates that the federal interest invoked by Allstate is too insubstantial to defeat California's strong interest in resolving in its own courts the issues raised by Allstate's assertion of the right to setoff. The district court's abstention order should therefore be reinstated.

Allstate invokes the jurisdiction of the federal courts to compel the arbitration of its dispute with the State under the Federal Arbitration Act, 9 U.S.C. §§ 1-16. *See* Br. Opp. at 19. But even if there is any issue in this dispute which is subject to arbitration, the right to seek an order compelling arbitration is enforceable in California's courts. *See Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984). That Congress, in enacting the Federal Arbitration Act, did not deem it necessary to "create any independent federal-question jurisdiction" to hear a suit to compel

arbitration, *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983), demonstrates that a federal forum is not essential to the vindication of the federal interest at issue here.

In contrast, California's interest in conducting the Mission liquidations and resolving this dispute in its own courts is substantial. Congress has granted the States broad authority under the McCarran-Ferguson Act to regulate the "business of insurance" from creation to dissolution. 15 U.S.C. § 1012(b); *see also Fabe*, 113 S.Ct. at 2204.[7] Consistent with the Congressional judgment that insurer liquidation proceedings are a matter of exclusive state interest, federal bankruptcy law specifically excludes insurers from the entities which are subject to it. *See* 11 U.S.C. § 109(b)(2) & (d).[8]

[7] The Court has observed that "'Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.'" *Fabe*, 113 S.Ct. at 2207 (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946)). The Court has further observed that the McCarran-Ferguson Act "'declar[es] expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.'" *Id.* (quoting *Benjamin*, 328 U.S. at 430).

[8] In the related area of state taxation, the Court has relied on the policies underlying the Tax Injunction Act to prohibit taxpayers from bringing damages actions in the federal courts, notwithstanding the Act's textual focus on equitable remedies. *See Fair Assessment*, 454 U.S. at 109-10. Here, the McCarran-Ferguson Act's re-affirmation of state authority to regulate insurance, *see* 15 U.S.C. § 1012(b), and the Federal Bankruptcy Code's specific exclusion of insurance companies from the entities subject to it, *see* 11 U.S.C. § 109(b)(2) & (d), provide a similar manifestation of the strong federal policy against federal court interference with insurer liquidation proceedings so long as those proceedings adequately protect a claimant's rights.

California, like all States, has relied on the broad authority granted it in the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), to enact "a complex and specialized administrative structure for the regulation of insurance companies from inception to dissolution." *Fabe*, 113 S.Ct. at 2204; *see generally* Cal. Ins. Code. As part of this regulatory structure, California has established a comprehensive and intricate scheme for liquidating insolvent insurers, *see id.* §§ 1010-1064.12, which includes, most significantly, provisions establishing the priority in which claims on the insurer's estate are to be paid, *see id.* § 1033, and the circumstances in which creditors can assert setoffs. *See id.* § 1031.

Demonstrative of the State's substantial interest in conducting the Mission liquidations free from federal interference, California law provides for the appointment of a receivership court and vests title to all of the insurer's assets in the State for disposition in the liquidation. *See id.* §§ 1011, 1016. Furthermore, state law authorizes the receivership court to enjoin "[i]nterference with the commissioner or the proceeding," "[t]he institution or prosecution of any actions or proceedings," and "[t]he obtaining of preferences, judgments, attachments, or other liens against [the insolvent insurer] or its assets," *id.* § 1020, a power which was exercised here. *See* Pet. App. 119a-21a (Order Appointing Liquidator And Restraining Order).

The court of appeals, however, gave no consideration to the State's substantial interest in having issues arising in the course of the liquidation proceedings be resolved by the receivership court (which through the course of the lengthy conservation and liquidation proceedings has acquired unique expertise in the statutory scheme) subject to review by the State's intermediate appellate and supreme courts. *Cf. Burford*, 319 U.S. at 327 ("[c]oncentration of judicial supervision of [agency] orders permits the state courts, like the [agency] itself, to acquire a specialized knowledge which is useful in shaping the policy of regulation"). Nor did the court of appeals consider whether the state liquidation proceedings failed to provide Allstate with an adequate forum. *See Alabama Pub. Serv. Comm'n*, 341 U.S. at 349 ("As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights.") (footnote omitted).

But most significantly, the court of appeals did not consider the complexity of the state law issues and the potential for frustration of the State's policy caused by the federal court's intervention. Indeed, the harm caused by the frustration of the State's policy would be especially significant in this case.

The state law issues implicated in this dispute include, *inter alia*, whether Allstate is entitled to set off reinsurance recoverables owed to its NESCO subsidiary by the Mission Insurance Company and in which, if any, of the five Mission liquidation estates the setoff can be asserted. These issues are complex and go to the core of California's policy. *See* Pet. Br. 5-6, Pet. App. 8a-9a. As the district court explained:

> If Allstate prevails on its set-off defense, it could deduct the set-off figure directly from the total amount it owes to the Mission companies under the reinsurance agreements. If Allstate's set-off claims are unsuccessful, then it would pay all amounts owed to Mission up front, and Allstate's set-off claims would be treated like any other Class 6 creditor claim against the Mission assets. Practically speaking, then, resolution of this issue will dramatically impact on who ultimately receives the Mission assets.

Pet. App. 15a. Whatever the correct resolution of this state law issue, the risk of getting it wrong is substantial enough to warrant abstention on the part of the federal courts.[9]

This Court has recognized that notwithstanding the existence of jurisdiction, federal courts should not interfere with state insurer liquidation proceedings. *See Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 197-99 (1935). In *Penn General Casualty*, a shareholder of an insurer had invoked diversity jurisdiction to bring suit in federal court seeking the appointment of a receiver and the liquidation of the

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[9] In the analogous area of bankruptcy, a federal court exercises "exclusive and nondelegable control over the administration of an estate in its possession." *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483 (1940). The Court has nonetheless instructed federal bankruptcy courts to submit to state courts "particular controversies involving unsettled questions of State property law . . . arising in the course of bankruptcy administration." *Id.; see also id.* at 484 ("Unless the matter is referred to the State courts, upon subsequent decision by the [State Supreme Court] it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme.").

company. *Id.* at 191-92. Three weeks later, the state insurance commissioner initiated proceedings in state court to liquidate the company. *Id.* at 192. Notwithstanding that the federal court suit had been brought first and that the federal court had acquired jurisdiction over the assets of the insolvent insurer and had authority to proceed on the claim, the Court observed:

> Although the District Court has thus acquired jurisdiction, the end sought by the litigation in the state court is the liquidation of a domestic insurance company by a state officer. In the absence of a showing that the interests of creditors and shareholders would not be adequately protected by this procedure, the case was a proper one for the District Court, in the exercise of judicial discretion, to relinquish the jurisdiction in favor of the administration by the state officer.

Id. at 197. *Cf. Pennsylvania v. Williams*, 294 U.S. 176, 183 (1935) (liquidation of bank under state regulation; Court holding that "the discretion of the District Court, invoked by the petition of the commonwealth, should have been exercised to relinquish the [federal court's] jurisdiction in favor of the statutory administration of the corporate assets by the state officer").[10]

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[10] To similar effect is *Texas v. Donoghue*, 302 U.S. 284 (1937), which involved a bankrupt oil company. The Court held that the federal bankruptcy court abused its discretion when it denied Texas leave to proceed with a suit seeking forfeiture of oil produced by the company which was brought in state court for violation of the State's conservation laws. *See* 302 U.S. at 286-89. As the Court recognized, "[f]orfeiture of unlawful oil under Texas law is a penalty imposed to vindicate the State's policy of conservation." *Id.* at 288.

Of further significance, in neither *Penn General Casualty* or *Williams* was the Court's instruction to the lower federal courts premised on the need to abstain because of an unclear issue of state law. *See generally Penn General Casualty*, 294 U.S. at 197; *Williams*, 294 U.S. at 184-86; *cf. Alabama Pub. Serv. Comm'n*, 341 U.S. at 346-50 (ordering abstention notwithstanding the absence of unclear state law issues on grounds "that regulation of intrastate railroad service [was] primarily" a state concern and State had provided an adequate system of review) (internal quotation and citation omitted); *Hart & Weschler* at 1365. But if the "proper regard for the rightful independence of state governments in carrying out their domestic policy," *Williams*, 294 U.S. at 185, required abstention even in the absence of any unclear issues of state law, it must surely do so here, where issues of great importance to the State's policy remain unsettled.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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